IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JUDY ANN MCBRIDE, as Personal Representative for the Estate of DURWOOD ROSCOE MCBRIDE, deceased, Appellant, v. LONGVIEW, PORTLAND & NORTHERN RAILWAY COMPANY, Respondent, and AMERICAN HONDA MOTOR CO., INC.; ASBESTOS CORPORATION LIMITED; ATLAS TURNER, INC.; AUBURN TECHNOLOGIES, INC.; BARTELL'S ASBESTOS SETTLEMENT TRUST; BELL ASBESTOS MINES LTD.; BOMBARDIER, INC.; C.H. MURPHY/ CLARK ULLMAN INC.; COOPER INDUSTRIES, INC.; CSK AUTO, INC.; DAIMLERCHRYSLER CORPORATION; FORD MOTOR COMPANY; GENERAL MOTORS CORPORATION; GUNNAR'S AUTO SUPPLY, INC.; GUNNAR'S AUTO SUPPLY NUMBER 2;	)	No. 56700-4-I **DIVISION ONE** UNPUBLISHED OPINION FILED: August 28, 2006

HONEYWELL INTERNATIONAL, INC.; INTERNATIONAL PAPER COMPANY; I.T.T. INDUSTRIES INC.; LONGVIEW SWITCHING COMPANY; METROPOLITAN LIFE INSURANCE COMPANY; NISSAN NORTH AMERICA, INC.; PNEUMO ABEX) CORPORATION; THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY and FIRST DOE through ONE HUNDREDTH DOE,

Defendants.

APPELWICK, C.J. — Judy McBride sued various defendants, alleging that asbestos exposure contributed to her husband's lung cancer and death. After one defendant, Longview, Portland & Northern Railway Company (LPN), asserted McBride's claims against it were time-barred, McBride voluntarily dismissed LPN with prejudice. Soon afterwards McBride settled with the remaining railroad defendants, and received an assignment of their cross claims for contribution against LPN. McBride attempted to enforce these cross claims but the court granted LPN's summary judgment motion. We hold that because the settlement with the remaining railroad defendants did not extinguish LPN's liability as required by RCW 4.22.040(2), McBride is not entitled to seek contribution from LPN.

FACTS

Durwood McBride died from lung cancer in 2000. After discovering that

her husband's lung cancer may have been caused by asbestos exposure, Judy McBride (McBride) sued various defendants in 2002. Durwood had been a switchman on railroads in Washington from 1955 to 1996, and McBride included several railroad companies as defendants. McBride's complaint contained product liability, civil conspiracy, negligent misrepresentation, false representation, wrongful death, loss of consortium, and Federal Employers' Liability Act claims.

Although McBride did not originally name Longview, Portland & Northern Railway Company (LPN) as a defendant in her suit, she later amended her complaint to add LPN. LPN and the other railroad defendants filed cross claims against each other for contribution and indemnification.

In December 2004, LPN filed a motion for summary judgment on the grounds that McBride's claim against LPN was time-barred.[1] Before the hearing on the motion, McBride dismissed LPN with prejudice.

One month later, in February 2005, McBride settled with the remaining railroad defendants: Union Pacific Railroad Company, Burlington Northern & Santa Fe Railway Company, and Longview Switching Company (settling railroads). The settling railroads were the last remaining defendants in the case. As part of the settlement, the settling railroads assigned McBride their cross claims against LPN.

In April 2005, McBride moved to commence trial to determine her rights under the assigned cross claims. LPN filed a motion for summary judgment

[1] The record does not show that any of the other defendants opposed LPN's motion.

contesting the validity of these claims, and the trial court granted LPN's motion. McBride appeals.

ANALYSIS

I. Right of Contribution under RCW 4.22.040(2)

McBride contends that she is entitled to contribution under RCW 4.22.040(2). She asserts that when she voluntarily dismissed LPN with prejudice, LPN's claim was extinguished for purposes of obtaining contribution. LPN counters that because its liability was extinguished by the dismissal, the settlement did not extinguish LPN's liability as required by RCW 4.22.040(2).

RCW 4.22.040(2) provides:

> Contribution is available to a person who enters into a settlement with a claimant only (a) if the liability of the person against whom contribution is sought has been extinguished by the settlement and (b) to the extent that the amount paid in settlement was reasonable at the time of the settlement.

Although much of the alleged asbestos exposure in this case occurred before the 1981 Tort Reform Act, the contribution provisions of the Act, including RCW 4.22.040 and .050, are applicable because this case was heard after July 26, 1981. See Zamora v. Mobil Oil Corp., 104 Wn.2d 211, 214-15, 704 P.2d 591 (1985); RCW 4.22.920(2). And because asbestos is a hazardous substance under RCW 4.22.070(3)(a), joint and several liability applies to asbestos exposure cases. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667-69, 771 P.2d 711, 780 P.2d 260 (1989).

LPN argues that Bunce Rental, Inc. v. Clark Equipment Co., 42 Wn. App.

644, 713 P.2d 128 (1986) is directly on point and demonstrates that contribution is not available when the plaintiff's claims against the non-settling defendant are dismissed before the settlement with the other defendants. In Bunce, the plaintiff sued Bunce Rental, and later added Clark Equipment as an additional defendant. Bunce, 42 Wn. App. at 645. Before trial, Clark Equipment moved for summary judgment, which Bunce Rental opposed. Bunce, 42 Wn. App. at 645. The court granted Clark Equipment's motion, stating that there were no issues of material fact and that Clark Equipment's product had no manufacturing defects. Bunce, 42 Wn. App. at 645. Bunce Rental settled with the plaintiff, and then unsuccessfully sought contribution from Clark Equipment. Bunce, 42 Wn. App. at 646.

On review, the Court of Appeals strictly construed RCW 4.22.040(2):

> We conclude that a strict reading of RCW 4.22.040(2) indicates that Bunce Rental is precluded from obtaining contribution in the present case. We reach this conclusion because the settlement between Bunce Rental and [the plaintiff] did not extinguish Clark Equipment's liability. The summary judgment secured by Clark Equipment had already extinguished its liability over a month prior to the settlement between Bunce Rental and [the plaintiff]. Therefore, we hold that under the wording of RCW 4.22.040(2), Bunce Rental has no right of contribution.

Bunce, 42 Wn. App. at 646-47. The court also noted that because Clark Equipment had no liability as a matter of law, there could be no joint and several liability, and thus Bunce Rental could not seek contribution. Bunce, 42 Wn. App. at 647-48.

LPN argues that Bunce is dispositive because McBride's voluntary

dismissal of her claims against LPN is analogous to the summary judgment in Bunce: both LPN and Clark Equipment had no liability to be extinguished at the time of the settlement. However, McBride asserts that Bunce is distinguishable because Clark Equipment's liability was extinguished as a matter of law on summary judgment on the merits. In contrast, McBride argues, there has never been a determination of LPN's liability on the merits, as McBride's voluntary dismissal of LPN was based on LPN's contention that the statute of limitations had run on McBride's claim.

McBride argues that Smith v. Jackson, 106 Wn.2d 298, 721 P.2d 508 (1986), is more analogous. In Smith, a passenger who had been injured in a collision sued Jackson, the driver of the other car, five days before the statute of limitations ran. Smith, 106 Wn.2d at 299. After the statute of limitations had run, Jackson brought a third party complaint against the passenger's mother, who was the driver of the car in which the passenger had been riding. Smith, 106 Wn.2d at 299. The passenger and Jackson settled, and the trial court specifically held that if Jackson had any right of contribution, it was preserved. Smith, 106 Wn.2d at 299. Jackson and the mother then learned that the road design may have been a factor in their collision, and both filed third party complaints against the county. Smith, 106 Wn.2d at 299-300. The mother and the county both filed motions for summary judgment, arguing that the statute of limitations had run on the original action before they had been brought in as third party defendants. Smith, 106 Wn.2d at 300. The trial court granted the

motions, stating that "if the initial claim is barred by the statute of limitations there is no right of contribution between these defendants." Smith, 106 Wn.2d at 300, 301.

The Washington Supreme Court disagreed. The court held that

> [t]he effect of this ruling would be to allow the plaintiff to pick and choose among joint tortfeasors to determine which defendants should bear the entire loss without contribution. . . . To allow a plaintiff in a case such as this the right to recover from one joint tortfeasor and, at the same time, preclude any contribution from another joint tortfeasor because of some special relationship is neither fair nor reasonable.

Smith, 106 Wn.2d at 301-02. The court allowed Jackson to seek contribution from the mother and the county. Smith, 106 Wn.2d at 304. McBride asserts that we should follow Smith because here, as in Smith, the reason the third party defendant was not liable was due to statute of limitations issues, not because of the underlying merits of the claim.

We need not resolve whether the voluntary dismissal with prejudice here was more akin to the summary judgment in Bunce or the failure to sue within the statute of limitations in Smith. This is because RCW 4.22.040(2) requires that LPN's liability be extinguished in the settlement for which contribution is being sought. The settlement between McBride and the settling railroads did not on its face purport to extinguish LPN's liability, as required by RCW 4.22.040(2). The pertinent language in the settlement agreement is as follows:

> McBride accepts the aforesaid payment as complete compromise of all claims which have accrued or which may hereafter accrue in favor of McBride against the Released Parties. McBride acknowledges receipt of payment by execution of this Agreement, and agrees that it is paid and accepted in full, final and complete

> compromise and settlement of all claims, demands, actions, injuries, damages, costs and compensation of any kind arising out of the subject matter of the Complaint or otherwise referenced in this Agreement, whether known or unknown, whether or not ascertainable at this time.
> …
> McBride agrees that this Agreement only affects obligations, duties and liabilities of the Released Parties, and not obligations, duties, and liabilities of any co-defendant or third party. This release is given in full consideration of only the Released Parties' liability, and is limited to the percentage or portion of liability for which the Released Parties are or may be found responsible in the event of a trial of any claims. If other parties are responsible to McBride for any damages, execution of this agreement shall operate as a satisfaction of McBride's claims against such other parties to the extent of the relative pro rata share of common liability of the Released Parties only.

(emphasis added). This language does not purport to extinguish LPN's liability. In fact, it expressly applies only to the obligations, duties, and liabilities of the settling railroads. Thus, the settlement did not conform with RCW 4.22.040(2) and McBride cannot seek contribution from LPN.[2]

II. Contribution under RCW 4.22.050(3)

McBride argues that her contribution claim is not time-barred because she complied with RCW 4.22.050(3). She claims that because she filed her action for contribution within one year of the settlement, her action is timely. LPN argues that because the settlement did not discharge the common liability, the claim is time-barred.

RCW 4.22.050(3) provides:

> If a judgment has been rendered, the action for contribution must be commenced within one year after the judgment becomes final.

[2] Neither party claims that the portion of the settlement addressing the satisfaction of McBride's claims to the extent of the pro rata share of the common liability operates to extinguish LPN's liability. Thus, we need not consider whether this language extinguishes LPN's liability.

> If no judgment has been rendered, the person bringing the action for contribution either must have (a) discharged by payment the common liability within the period of the statute of limitations applicable to the claimant's right of action against him and commenced the action for contribution within one year after payment, or (b) agreed while the action was pending to discharge the common liability and, within one year after the agreement, have paid the liability and commenced an action for contribution.

"Inherent in the term 'common liability' as used in RCW 4.22.050(3) is the assumption that the liability of the defendant against whom contribution is sought has been extinguished." Baker v. Winger, 63 Wn. App. 819, 824, 822 P.2d 315 (1992).

McBride did bring her contribution action within one year of her settlement with the settling railroads. This was within the time period required in RCW 4.22.050(3). However, that settlement did not extinguish LPN's liability. Thus, because the common liability was never discharged, McBride could not and did not comply with RCW 4.22.040(2) or RCW 4.22.050(3). Her contribution claim is barred.[3]

We affirm.

Appelwick, C.J.

WE CONCUR:

Grosse, J.

Coburn, J.

[3] LPN made several additional arguments. LPN argued that McBride invited error below by claiming that post-1981 statutory law did not apply to her claim, that McBride abandoned her indemnification claim, and that the assignments of cross claims were invalid because they were not signed by the settling railroads. Because we rule for LPN on the merits, we need not address these claims. Further, as to the unsigned assignment issue, LPN only mentioned this claim in passing both in its brief and at oral argument. Thus, we do not consider this claim. See Saunders v. Lloyd's of London, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (appellate court will not consider a claim absent adequate argument and briefing).